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No. 80-1899

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; and THE INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE ROCK ISLAND RESPONDENTS IN OPPOSITION

NICHOLAS G. MANOS
332 South Michigan Avenue
Chicago, Illinois 60604
(312) 435-7494

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

GOLDBERG, KOHN, BELL, BLACK & ROSENBLOOM, CHTD.
55 E. Monroe Street
Chicago, Illinois 60603
(312) 332-2177

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

NICHOLAS G. MANOS
Attorney for William M. Gibbons, Trustee of Chicago, Rock Island & Pacific Railroad Company

ALBERT E. JENNER, JR.
DANIEL R. MURRAY
BARBARA S. STEINER
DEBORAH H. BORNSTEIN
RANDALL E. MEHRBERG
Attorneys for Henry Crown, et al.

TERRY F. MORITZ
Attorney for The First National Bank of Chicago, as Indenture Trustee

MILTON L. FISHER
HAROLD L. KAPLAN
Attorneys for Continental Illinois National Bank and Trust Company of Chicago, as Indenture Trustee

July 15, 1981

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BRIEF FOR THE ROCK ISLAND RESPONDENTS IN OPPOSITION[1]

STATEMENT

The facts pertinent to these proceedings are fairly set forth in the Brief for the Federal Respondents in Opposition

[1]The Rock Island respondents are: William M. Gibbons, Trustee of the Chicago, Rock Island & Pacific Railroad Company; Henry Crown, et al., substantial holders of first mortgage bonds, income debentures and common stock of the Rock Island; The First National Bank of Chicago, as indenture trustee for the first mortgage bondholders; and Continental Illinois National Bank and Trust Company of Chicago, as indenture trustee for the income debenture holders. Parent companies, subsidiaries and affiliates of the Rock Island respondents are listed in the appendix hereto. The federal respondents are the Interstate Commerce Commission and the United States.

at pages 1-3 and in the opinion of the court of appeals (Pet. App. 1a-15a).[2]

ARGUMENT

1. This petition does not merit review by this Court because this case has no precedential value for any other railroad reorganization case. Section 77 of the Bankruptcy Act of 1938, 11 U.S.C. §205, the statute under which this case was decided, has been repealed by the Bankruptcy Reform Act of 1978, 11 U.S.C. §§101, *et seq.* (Supp. III 1979). The new Code expressly provides for liquidation of a railroad under the aegis of a reorganization court. 11 U.S.C. §1174 (Supp. III 1979). The new Code also eliminates the role of the Commission in conducting hearings on plans of reorganization and reposes that function solely in the bankruptcy courts. 11 U.S.C. §§1161, *et seq.* (Supp. III 1979). Because the new Code applies to all railroad reorganizations filed after its effective date (October 1, 1979), *see* sections 402 and 403 of Pub.L. No. 95-598, 92 Stat. 2683, this case can have no precedential value for railroad reorganization proceedings brought under the new Code.

The petitioner does not dispute this absence of precedential value for future railroad reorganizations but argues instead that the decision in this case will impact on the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee Road"), the only other Section 77 railroad reorganization pending in the Seventh Circuit. (Pet. 12.)[3] The court of appeals, however, ex-

[2]For a more complete narrative of these reorganization proceedings, the Rock Island respondents respectfully refer the Court to pp. 4-7 of their Motion to Affirm, filed December 17, 1980, in *RLEA v. Gibbons, appeal pending*, U.S., No. 80-415, and pp. 3-6 of their Motion to Affirm and Consolidate, filed February 18, 1981, in *RLEA v. Gibbons, appeal pending*, U.S., No. 80-1239.

[3]Two other Section 77 proceedings also pend in other circuits: *In re Boston & Maine Corp.*, No. 70-250-M (D. Mass.), in which a preliminary reorganization plan has already been filed; and *In re New York, Susquehanna & Western R.R.*, No. B-76-182 (D. N.J.), in which the trustee's plan of liquidation has already been approved by both the Commission and the reorganization court. Thus, the opinion in this case is of no precedential value in either proceeding.

pressly recognized that "each railroad in reorganization under Section 77 must be handled according to the unique circumstances of that debtor" (Pet. App. 14a), and therefore based its decision on the peculiar circumstances of the Rock Island. Presumably for that reason, the Seventh Circuit declined to publish the opinion in this case under its own Circuit Rule 35,[4] thus precluding reliance on this case as precedent for any other case within the circuit.

Even were the Rock Island case available as precedent for the Milwaukee Road reorganization proceedings, the two cases are sharply distinguishable. District Judge Frank J. McGarr, who has presided over the Rock Island's reorganization since its inception in March of 1975, issued his liquidation order against the background of continuing excessive losses, a crippling strike of employees and ultimately the cashlessness of his trustee. *See Chicago, Rock Island & Pacific Railroad—Abandonment*, 363 I.C.C. 150 (1980). Liquidation of the Rock Island was favored not only by its creditors and shareholders, but also by the Department of Transportation, after consultation with the Commission (Tr., Jan. 23, 1980, at 23-31; Tr., Jan. 25, 1980, at 66-72), and by the Court's own independent expert witness, who testified that a successful reorganization structured upon a smaller core was not possible (Tr., Jan. 23, 1980, at 10-18). In the case of the Milwaukee Road, by contrast, neither the Department of Transportation nor the Commission has advocated liquidation, and the Milwaukee Road trustee continues to have the support of the reorganization court in his efforts to achieve a successful reorganization of the Milwaukee Road structured upon a smaller, viable core. Thus, the cases of the Rock Island and the Milwaukee Road are wholly dissimilar.

[4]Circuit Rule 35(b)(2)(iv) provides:

> Except to support a claim of *res judicata*, collateral estoppel or law of the case, [unpublished orders] shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose.

2. This petition does not merit review because the decision of the court below conforms with the decisions of this Court and of other courts of appeals. Petitioner argues that Section 77 of the pre-1978 Bankruptcy Act "does not give a railroad reorganization court the power to liquidate an estate" (Pet. 19); petitioner apparently would have this liquidation proceed through equity receiverships in each of the thirteen states in which the Rock Island has property. Petitioner overlooks the express language of Section 77(b), which states that a plan of reorganization may include provisions for the "sale of all or any part of the property of the debtor." (Pet. App. 32a.) Thus, Section 77 expressly anticipates that the disposition of all of the property of the debtor—*i.e.*, liquidation—is one possible method of reorganization. *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392, 421 (1970). *Accord, In re Lehigh Valley Railroad*, 558 F.2d 137, 142-47 (3d Cir. 1977); *In re Huntingdon & Broad Top Mountain R. R. & Coal Co.*, 213 F.2d 411, 416-17 (3d Cir. 1954); *In re Penn Central Transportation Co.*, 395 F. Supp. 567 (E.D. Pa. 1975); *In re Tennessee Central Railway Co.*, 304 F. Supp. 789 (M.D. Tenn. 1969).

Indeed, the reorganization court's liquidation order not only conforms to prior decisions of this Court but it was constitutionally compelled. This Court has recognized that an unconstitutional taking of property occurs when a railroad is forced to continue operations after the public interest has been served for too long at the railroad's expense. *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920). The reorganization court's order properly recognized "the basic principle that an owner of property retains the right ultimately to withdraw that property from a losing venture. Indeed, such a right appears to be a fundament of the taking provision." *In re Central Railroad Company of New Jersey*, 485 F.2d 208, 213 (3d Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974).

Since the inception of the reorganization of the Rock Island, the bankrupt estate has suffered devastating losses and a crippling

strike of its employees that left the trustee cashless, with no prospect of a successful reorganization as an ongoing railroad even in the most favorable core configuration. *Chicago, Rock Island & Pacific Railroad—Abandonment*, 363 I.C.C. 150 (1980). As in the case of the New Haven Railroad, "[t]he public interest has had one huge bite at the apple; it is not entitled to another." *New Haven Inclusion Cases, supra*, 399 U.S. at 466, *quoting with approval, In re New York, New Haven and Hartford Railroad*, 304 F. Supp. 793, 801 (D. Conn. 1969).

Based upon a strained reading of *In re Lehigh Valley Railroad, supra*, 558 F.2d at 145, petitioner contends that the reorganization court erred by failing to take steps to assure the continuation of rail services before it issued its liquidation order. (Pet. 20.) But at the time Judge McGarr issued the liquidation order, rail service was continuing over Rock Island lines pursuant to the Commission's directed service order. I.C.C. Directed Service Order No. 1398, 360 I.C.C. 289 (1979). Furthermore, Judge McGarr refused to transmit the trustee's core plan of reorganization to the Commission precisely because he feared that the transmission of a nonviable plan to the Commission would delay the orderly disposition of Rock Island lines to other carriers, and thus would increase the risk of interruptions in rail service. (Tr., Jan. 25, 1980, at 98.)

The fact that the Rock Island cannot and will not continue as an ongoing railroad does not preclude the possibility that some of its lines will remain in rail use, owned and operated by solvent railroads. Indeed, the liquidation of the Rock Island and the disposition of viable lines to solvent rail carriers may offer the most realistic prospect of continuing those lines in rail service. To deny the Rock Island the auspices of Section 77—as petitioner apparently intends—and to insist that liquidation proceed under a series of common law equity receiverships, with all their attendant procedural complexities and confusion, is the surest way of inhibiting orderly disposition of Rock Island lines to other carriers and their continued use in rail service.

3. This matter has become moot. In the absence of any stay order, the liquidation of the Rock Island has continued. As petitioner now concedes (Pet. 12), there is no longer any prospect that the Rock Island can resume operations as an operating railroad.

Furthermore, no purpose would be served by now requiring the trustee to forward his first plan of reorganization to the Commission because the Commission has already approved the complete liquidation and abandonment of the Rock Island in its report of May 27, 1980. *Chicago, Rock Island & Pacific Railroad—Abandonment*, 363 I.C.C. 150 (1980). Under these circumstances, where both the reorganization court and the Commission have approved liquidation of the Rock Island, no conflict exists between the Commission and the reorganization court. The decisions of this Court in *Ecker* v. *Western Pacific Railroad*, 318 U.S. 448 (1943) and *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939), upon which petitioner relies to urge referral of the plan to the Commission (Pet. 15-17), are therefore inapposite to this case. Section 77 does not require further consultation between the reorganization court and the Commission when both are already in agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

NICHOLAS G. MANOS
332 South Michigan Avenue
Chicago, Illinois 60604
(312) 435-7494

Nicholas G. Manos
Attorney for William M. Gibbons, Trustee of the Chicago, Rock Island & Pacific Railroad Company

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Albert E. Jenner, Jr.
Daniel R. Murray
Barbara S. Steiner
Deborah H. Bornstein
Randall E. Mehrberg
Attorneys for Henry Crown, et al.

GOLDBERG, KOHN, BELL, BLACK & ROSENBLOOM, CHTD.
55 E. Monroe Street
Chicago, Illinois 60603
(312) 332-2177

Terry F. Moritz
Attorney for The First National Bank of Chicago, as Indenture Trustee

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

Milton L. Fisher
Harold L. Kaplan
Attorneys for Continental Illinois National Bank and Trust Company of Chicago, as Indenture Trustee

July 15, 1981

APPENDIX

Parent Companies, Subsidiaries and Affiliates

Parent companies, subsidiaries and affiliates of the Rock Island respondents are as follows:

A. William M. Gibbons, in his capacity as Trustee of the Chicago, Rock Island and Pacific Railroad Company

Affiliates

A&M Ry. Bridge & Terminal Co.
The Belt Ry. Co. of Chicago
Calumet Western Ry. Co.
Denver Union Terminal Ry. Co.
Galveston Terminal Ry. Co.
Great Southwest R.R., Inc.
Houston Belt & Terminal Ry. Co.
Illinois Terminal R.R. Co.
Iowa Transfer Ry. Co.
Joliet Union Depot Co.
Keokuk Union Depot Co.
The Minnesota Transfer Ry. Co.
Oklahoma City Jct. Ry. Co.
Peoria & Bureau Valley R.R. Co.
Peoria Ry. Terminal Co.
Peoria Terminal Company
Pullman Railroad Company
Rock Island Improvement Co.
St. Paul Union Depot Co.
Trailer Train Company
Warren & Ouachita Valley Ry. Co.
Wichita Union Terminal Ry. Co.

B. The First National Bank of Chicago

Parent

First Chicago Corporation

Principal Subsidiaries

Network EFT, Inc.
International Commercial Bank Limited
N.V. Slavenburg's Bank

Principal Affiliates

First Chicago Cheque Corporation
First Chicago Trust Company of Arizona
First Chicago Realty Services Corporation
First Capital Corporation of Chicago
First Chicago Fiduciary and Investment Services Corporation
First Chicago Overseas Finance N.V.
First Chicago Financial Corporation
First Chicago Credit Corporation
Real Estate Research Corporation
First Chicago Lease Holdings, Inc.
UBAF Arab American Bank

C. Continental Illinois National Bank and Trust Company of Chicago

Parent

Continental Illinois Corporation

Subsidiaries

Continental International Finance Corporation
Continental Bank International (Texas)
Continental Bank International (Pacific)
Continental Bank International
Conill Bank A.G.
Continental Bank S.A./N.V.
Continental Illinois Bank (Switzerland)
Continental Development Bank, S.A.L.
Underwriters Bank (Overseas) Limited
Continental Illinois Thailand Ltd.

Affiliates

Continental Illinois Leasing Corporation
Continental Illinois Equity Corporation
Continental Illinois Venture Corporation

Republic Realty Mortgage Corporation
Continental Illinois (Canada) Ltd.
Continental Illinois Investment Advisory
Continental Illinois Limited
Continental Illinois International Investment

D. Henry Crown, et al., include the Arie and Ida Crown Memorial, an Illinois not-for-profit corporation, which has no parent, subsidiaries or affiliates.